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In The

Supreme Court of the United States

October Term, 1992

NICOLE ADAMS, a Minor Child, By and Through Her Next Friend, BETTY RIDGELL, and BETTY RIDGELL, as Representative of the Estate of JULIA ALICE ADAMS,

Petitioners,

v.

THE CHILDREN'S MERCY HOSPITAL and JANE JELINEK-BOOZALIS, M.D.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Missouri

RESPONDENT THE CHILDREN'S MERCY HOSPITAL'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FLOYD R. FINCH*
TIMOTHY M. AYLWARD
SALLY L. THIEMAN
BLACKWELL SANDERS MATHENY WEARY & LOMBARDI
Two Pershing Square
Suite 1100
2300 Main Street
P.O. Box 419777
Kansas City, Missouri
64141-6777
(816) 274-6800

Attorneys for Respondent The Children's Mercy Hospital

*Counsel of Record

October 26, 1992

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction to issue a writ of *certiorari*, pursuant to 28 U.S.C. § 1257, when the specific constitutional questions at issue were not presented to the state court below, in a timely manner, to enable the state court to pass on those questions?

2. Is a substantial federal question presented by the Petition for Writ of *Certiorari* in light of the fact that this Court has refused to review similar statutes from other states limiting damage awards in medical negligence cases on the grounds that no substantial federal question was presented thereby?

3. Is the Due Process Clause of the Fourteenth Amendment violated by a state statute which merely modifies, but does not abrogate, a common law cause of action?

4. Is the Equal Protection Clause of the Fourteenth Amendment violated by a state statute which, in limiting recovery of noneconomic damages in medical malpractice actions, neither impacts a suspect class nor impairs a fundamental right?

PARTIES TO THE PROCEEDINGS

The parties to these proceedings are as indicated in the caption of the Petition for Writ of *Certiorari*, with the exception of Suzanna Roushar, R.N., and Cynthia Dooley, R.N. Petitioners have listed Ms. Roushar and Ms. Dooley as parties although they did not participate in the appeal in the Missouri Supreme Court below.

Both Ms. Roushar and Ms. Dooley received verdicts in their favor in the trial of this cause. Petitioners, plaintiffs below, did not preserve any claim of error as to either of those defendant's verdicts. The time for preserving any such claim of error for appeal has long since passed. Neither Ms. Roushar nor Ms. Dooley joined in the hospital's appeal in the Missouri Court of Appeals. Therefore, they are not parties to this appeal and are no longer parties to this action.

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STATEMENT OF THE CASE

Respondent The Children's Mercy Hospital has reviewed the Statement of the Case in the Petition for Writ of *Certiorari* and takes issue with some of petitioners' assertions:

First, petitioners contend, at page 4 of their petition, that the jury award to Nicole Adams of $13,905,000.00 for noneconomic damages was reduced to $860,000, "a decrease of $13,045,000.00," by virtue of the "capping" provisions of § 538.210.1.[1] That statement is inaccurate.

Petitioner Nicole Adams' award of $13,905,000.00 was first reduced by 62%, which represented that share of the total fault which the jury apportioned to persons who had been released by plaintiffs prior to trial, by virtue of the operation of § 538.230.[2] Therefore, Nicole Adams' award of noneconomic damages was first reduced from $13,905,000.00 to $5,283,900.00.[3] Thereafter, by virtue of

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[1] All statutory cites are to Missouri Revised Statutes (Mo. Rev. Stat.) unless otherwise indicated.

[2] Petitioners have abandoned any constitutional challenge to the validity of this statute. Petition for Writ, page 5. Section 538.230 provides, in pertinent part:

> . . . the claim of the releasing person against other persons or entities is reduced by the amount of the released persons' or entities' equitable share of the total obligation imposed by the court pursuant to a full apportionment of fault under this section as though there had been no release.

[3] This figure represents 38% of the total award of non-economic damages to Nicole Adams.

the capping provisions of § 538.210, the award of non-economic damages was further reduced to $860,000.[4]

Second, petitioners recite, in footnote 2 on page 4 of their petition, that defendants "opted" to assess fault to released parties and therefore prior settlements worth $5,505,779.00 were not applicable to the entry of judgment. This is also inaccurate. The amounts of prior settlements were not applicable to the entry of judgment, not because of any "option" exercised by defendants, but again by virtue of the operation of § 538.230.

Finally, petitioners also claim, at page 4 of their petition, that the federal constitutional questions were timely raised at every stage of the proceedings. Respondents disagree. The statutes in question were enacted in 1986. Petitioners' cause of action arose on March 30, 1988, more than two years later. Petitioners filed their original petition on September 15, 1989. The case went to trial on February 11, 1991. Petitioners did not first raise any objection to the constitutional validity of any section of Chapter 538 until February 5, 1991,[5] less than a week before trial.

Missouri law requires that constitutional challenges be raised at the earliest opportunity that "good pleading" permits.[6] Respondents respectfully suggest that petitioners' constitutional challenge was not timely.

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[4] The maximum "cap" amount of $430,000, multiplied by two defendants.

[5] When petitioners filed their Motion to Bar Enforcement of Chapter 538.

[6] *Land Clearance for Redevelopment Authority of Kansas City v. Kansas University Endowment Association*, 805 S.W.2d 173, 176 (Mo. banc 1991).

Additionally, petitioners never raised the issue of whether the Due Process Clause of the Fourteenth Amendment requires a *"quid pro quo"* in return for a modification of the common law in either the trial court or the Missouri Supreme Court. Petitioners have raised that issue in their petition for the first time.

REASONS FOR DENYING THE WRIT

Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). The sole issue presented here is the constitutionality of the "capping" provisions of § 538.210 in light of the Due Process and Equal Protection clauses of the Fourteenth Amendment.[7] Petitioners have not raised their constitutional challenges in a specific and timely manner. They first made a general objection to the constitutional validity of Chapter 538 as violating their rights to due process and equal protection under the "Bill of Rights."[8] Petitioners first raised the specific question of whether the Fourteenth Amendment's guarantee of due process required the legislature to provide a *"quid pro quo"* in return for a modification of the common law in their petition for writ of *certiorari*. Therefore, the Missouri Supreme Court did not have an opportunity to pass on this specific issue. Because the issues now presented by petitioners are untimely, the writ should be denied.

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[7] Petition for Writ, page 5.

[8] Petitioners' Motion to Bar Enforcement of Chapter 538 with Suggestions In Support, Appendix A.

The analysis which this Court employs to determine whether a statute violates either the Due Process or Equal Protection clauses of the Fourteenth Amendment has been clearly delineated in prior opinions, leaving no room for any genuine question about the constitutional validity of this statute. The very same issues raised in the petition for writ have been urged upon this Court in the past, and this Court has repeatedly found that these issues do not present a substantial federal question.

Because no person has a vested property interest in any rule of common law, the legislature's modification of the common law does not amount to a "taking" so as to infringe upon any person's right to due process. And a statute which merely modifies a common law cause of action, but does not completely abrogate or replace it, need not provide a *quid pro quo* to avoid constitutional infirmity.

Furthermore, a statute which limits recovery of non-economic damages in medical malpractice actions neither impacts a suspect class nor impairs a fundamental right, and therefore the legislature need only have had a rational basis for the enactment to avoid violation of the Equal Protection Clause of the Fourteenth Amendment.

As none of the provisions of § 538.210 are repugnant to the Constitution, *certiorari* should be denied.

I. A WRIT OF CERTIORARI SHOULD BE DENIED DUE TO PETITIONERS' FAILURE TO RAISE THEIR CONSTITUTIONAL CHALLENGE IN A TIMELY MANNER SO IT COULD BE PASSED UPON BY THE STATE COURT

Respondents respectfully urge this Court to deny the requested writ of *certiorari* because the petitioners failed to raise their constitutional challenges in a timely manner under Missouri law, and thereby deprived the Missouri Supreme Court of the opportunity to pass on the issue petitioners now press upon this Court. Petitioners did not urge the unconstitutionality of any provision of Chapter 538 in the proceedings below until filing their Motion to Bar Enforcement of Chapter 538 just six days before trial. Nonetheless, the disputed statute had been in existence for two years before petitioners' cause of action had accrued, and for five years by the time petitioners first raised any objection to it. Raising constitutional questions in this manner failed to satisfy clear and fundamental requirements of Missouri law:

> It is firmly established that a constitutional question must be presented *at the earliest possible moment "that good pleading* and orderly procedure will admit under the circumstances of the given case, otherwise it will be waived."

Callier v. Director of Revenue, 780 S.W.2d 639, 641 (Mo. banc 1989) (emphasis added) (*quoting Securities Acceptance Corp. v. Hill,* 326 S.W.2d 65, 66 (Mo. 1959)). *See also Land Clearance for Redevelopment Authority of Kansas City v. Kansas University Endowment Association,* 805 S.W.2d 173, 176 (Mo. banc 1991).

In addition, the petitioners never raised the issue of whether the Fourteenth Amendment's guarantee of due process required a state legislature to provide a *"quid pro quo"* when modifying the common law at any stage of the proceedings below.[9]

This Court has repeatedly held that *certiorari* should be denied in instances where a constitutional issue is raised for the first time with this Court, without having given the state court below the opportunity to pass upon the issue. *Webb v. Webb*, 451 U.S. 493 (1981). In *Webb*, this Court dismissed a writ of *certiorari* for want of jurisdiction after it determined that the question presented by petitioner – whether a Georgia court was required by Article IV of the United States Constitution to give "full faith and credit" to the judgment of a Florida court in a child custody dispute – had not been raised in the Georgia Supreme Court below.

In reaching its decision, this Court commented:

> Because this case comes to this Court from a state court, the relevant jurisdictional statute is 28 U.S.C. § 1257 . . . that statute requires that in state courts petitioner have *"specially set up or claimed* under the Constitution . . . of . . . the United States" *that right which she now seeks to enforce* . . . Similarly our Rule . . . requires the petitioner to "specify the stage in the proceedings, both in the court of the first instance and

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[9] Petitioners did not raise the *"quid pro quo"* argument under the 14th Amendment in the pre-trial Motion to Bar Enforcement of Chapter 538, nor in the post-trial Motion to Modify Judgment, nor in their appeal to the Missouri Supreme Court.

> in the appellate court, at which *the federal questions sought to be reviewed* were raised; the method or manner of raising them and the way in which they were passed upon by the court."

Id. at 495 (emphasis added).

The federal questions which petitioners herein now seek to have reviewed by this Court are (1) whether the Due Process Clause permits "caps" on recoveries without any *quid pro quo,* and (2) whether the Equal Protection Clause prohibits a statute which discriminates against plaintiffs in medical negligence cases, and further creates "a discriminatory subclass of persons within the class of medical malpractice victims."[10] Neither of these precise questions were "specially set up or claimed" as mandated by the holding of *Webb:*

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.

451 U.S. at 496-497.

Following well-established precedent, developed over the years with an eye toward comity between the states and the federal government, this Court held in *Webb:*

> Citing a long history of cases, . . . "[t]he Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions."

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[10] Petition for Writ, pp. (i), 26.

Id. at 499 (*quoting Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969)).

In light of *Webb*, respondent respectfully suggests that the Court lacks jurisdiction under 28 U.S.C. § 1257 to review this case, and the writ of *certiorari* should be denied.

II. A SUBSTANTIAL FEDERAL QUESTION IS NOT PRESENTED BY THIS PETITION

A substantial federal question, warranting this Court's review, is not presented by this petition. In fact, this Court has refused to review the constitutionality of similar medical malpractice reform legislation or "capping" statutes from other states on at least three separate occasions in recent years. *Jones v. State Board of Medicine*, 555 P.2d 399 (Idaho 1976), *cert. denied*, 431 U.S. 914 (1977); *Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985), *appeal dismissed*, 474 U.S. 892 (1985); and *English v. New England Medical Center, Inc.*, 541 N.E.2d 329 (Mass. 1989), *cert. denied*, 493 U.S. 1056 (1990). The "capping" statute upon which petitioners seek review in the instant case is a less restrictive modification of state common law than those statutory provisions in the cases cited above where this Court determined no substantial federal question was presented.

In the instant case, petitioners seek review of only one statutory section of Chapter 538, specifically § 538.210, which sets a cap on noneconomic damages

only,[11] which cap is adjusted annually to account for inflation.[12] That statute imposes no limits whatsoever on a plaintiff's recovery of economic or pecuniary damages, nor does that statute otherwise limit a plaintiff's remedies or theories of recovery.

However, in *Jones*, the Idaho Legislature enacted statutes which placed limitations on both recoveries *and remedies* in medical malpractice actions. Those statutes included across-the-board caps[13] on any recovery against physicians and hospitals of $150,000 per claim and $300,000 per occurrence.[14]

The Idaho enactment also limited the grounds upon which a medical malpractice action could be brought to only those of common law negligence, and required that recovery should be restricted to "compensatory damages", and then only those compensatory damages not

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[11] § 538.210.1

[12] § 538.210.4. This inflation adjustment feature has resulted in the cap being increased each year since its inception in 1986. The cap has been adjusted as follows:

1986 – $350,000
1987 – $356,000
1988 – $373,000
1989 – $391,000
1990 – $401,000
1991 – $430,000
1992 – $446,000

[13] On both noneconomic and economic damages. Idaho Code § 39-4204, 39-4205.

[14] In the case of hospitals, the cap may, in certain circumstances, be calculated to be an amount equal to the number of beds in the hospital, multiplied by $10,000. Idaho Code § 39-4205.

already satisfied from collateral sources.[15] The Idaho Supreme Court, in *Jones*, noted parenthetically that the term "compensatory damages" was intended to exclude punitive damages.[16]

Clearly, the limitations imposed on medical malpractice actions by the Idaho statutes are far more onerous than Missouri's partial cap. Missouri's statute does not impose an across-the-board cap on all damages, but only on noneconomic damages. There is no limit under § 538.210 to economic or pecuniary damages. Furthermore, Missouri's statute does not alter the traditional "collateral source" rule, nor does it prohibit punitive damages.[17]

And equally clearly, if this Court denied *certiorari* to petitioners in *Jones* due to the absence of a substantial federal question, there cannot be a more compelling federal question presented by the less restrictive regulation of the Missouri statute in question here.

The California statutes in question in *Fein*, could also be considered more restrictive than the Missouri regulation in question here. In addition to limiting the amount of noneconomic damages that a plaintiff can recover to a total of $250,000,[18] the California statute also modified the "collateral source" rule to allow a defendant, at his

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[15] Idaho Code § 39-4210.

[16] 555 P.2d at 402.

[17] Section 538.210.5 expressly provides for awards of punitive damages under appropriate circumstances.

[18] Cal. Civ. Code § 3333.2. **Note:** Missouri's cap is "per defendant," not per occurrence like California's.

option, to introduce evidence of benefits received or available to the plaintiff from various collateral sources.[19]

Again, the California statutes are more restrictive than the Missouri model. Missouri's cap is flexible, both in terms of annual adjustments for inflation and the number of parties in the case, all of which inures to the benefit of the injured patient.

In *Fein*, this Court initially granted *certiorari* and then later dismissed plaintiff's appeal "for want of a substantial federal question." 474 U.S. 892. If this Court found the challenge to California's regulation devoid of a substantial federal question, surely the Court is of like mind regarding Missouri's.

In the most recent case where this issue has been urged on this Court, *English v. New England Medical Center, Inc.*, a jury awarded an injured patient $350,000, which was promptly reduced to $20,000 by virtue of a Massachusetts statute[20] which limited the liability of charitable institutions to only $20,000. The Massachusetts Supreme Court upheld that statutory limitation against constitutional attack and this Court denied *certiorari*. 493 U.S. 1056 (1990). Undeniably, Massachusetts' cap of $20,000 is more onerous than Missouri's partial cap.

Therefore, as recently as two years ago, this Court determined that constitutional challenges advanced by

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[19] In return, plaintiffs in California are allowed, at their option, to introduce evidence of the cost to them of securing such payments (i.e. disability insurance premiums). Cal. Civ. Code § 3333.1.

[20] Mass. Gen. L. ch. 231, § 85K.

aggrieved plaintiffs against similar but more restrictive "capping" legislation from other states do not present a substantial federal question. Respondent respectfully suggests that the grounds stated in the instant petition for writ of *certiorari* are no more compelling, and should not be treated any differently by this Court than the above-cited requests for review.

Historically, this Court has been reluctant to involve itself in matters which are traditionally the exclusive province of the states. In *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), this Court held that federal courts must defer to the "laws of the several states" as substantive rules of decision in the courts of the United States. That landmark decision was grounded in the recognition that:

> There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. . . . [T]he Constitution of the United States, . . . recognizes and preserves the autonomy and independence of the States – independence in their legislative and independence in their judicial departments.

304 U.S. at 78-79.

Because of time-honored notions of Federalism, this Court should deny petitioners' request for review of § 538.210.

III. SECTION 538.210 DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

A. The Due Process Clause of the Fourteenth Amendment Does Not Prohibit a State Legislature From Modifying the Common Law.

As this Court has clearly stated in the past, the Due Process Clause of the Fourteenth Amendment does not restrict the right of state legislatures to amend, modify or even eliminate the common law of their respective states.[21] This Court has on numerous occasions stated that there is no vested property interest in *any* rule of the common law[22] and that:

> [t]he Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object, despite the fact that otherwise settled expectations may be upset thereby.

Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 88 n.32 (1978).

The proposition that the common law cannot be amended, modified or abolished without violating the

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[21] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[22] *New York Central Railroad Co. v. White*, 243 U.S. 188, 198 (1916); *Mondou v. New York, New Haven and Hartford R.R. Co.*, 223 U.S. 1, 51 (1911). *See also Lucas v. United States*, 807 F.2d 412, 422 (5th Cir. 1986).

Due Process Clause would lead to harsh results considering that the law is not stagnant, but changes and adapts to the times and conditions then present. *West v. Louisiana*, 194 U.S. 258, 262 (1903).

It bears noting that the common law of England was adopted in Missouri by statute,[23] not by constitutional provision. It seems beyond serious argument that what a legislature can enact by statute, it can modify or even repeal by similar legislative enactment.

State laws resolving issues of state concern are presumed constitutional and will be enforced even if the statute is harsh, unjust, or oppressive to some. *Usery v. Turner Elkorn Mining*, 428 U.S. 1, 15 (1976); *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 523 (1885).[24] And it is

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[23] Section 1.010 provides:

> The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, of a general nature, which are not local to that kingdom and not repugnant to or inconsistent with the Constitution of the United States . . . are the rule of action and decision in this state . . .

James I ascended to the throne of England in 1603. Surely petitioners do not mean to suggest that any legislative modification of the common law from the way it existed in 1607 gives rise to due process considerations.

[24] It is not upon this Court to determine whether any act within the power of the state legislature is fair or unfair, good or evil. *Watson v. Buck*, 313 U.S. 387, 403 (1940). This United States Supreme Court is not a "super legislature" that questions the state's right to regulate business and industrial conditions within its borders. *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963). For example, in *Missouri Pacific*, this Court upheld a Missouri statute which limited a plaintiff's damages to twice his actual loss. 115 U.S. at 524.

well settled that tort law is a state, not federal, concern. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 79 (1980) (Marshall, J., concurring) (cites omitted). It is, therefore, clearly within the province of the state legislature to prescribe limits within which a jury can exercise its discretion in awarding damages,[25] despite any claim to the contrary by petitioners that the exercise of such power is unjust or oppressive.

Respondent admits that Missouri's cap on noneconomic compensatory damages may, in some cases, not fully compensate a plaintiff for his/her noneconomic loss. However, contrary to petitioners' assertions, due process is not violated just because an injured party does not recover as much under a statute which modifies the common law as she would have recovered under the unaltered common law.[26] Moreover, Chapter 538 does not deny petitioners, or any plaintiff, a remedy for a wrong done. Instead, it simply defines the substantive law by *limiting* – not eliminating – the amount of *noneconomic* recovery available. Missouri did not, therefore, violate the Due Process Clause when its legislature adopted Chapter 538.

B. Due Process Does Not Require a Quid Pro Quo or Reasonably Just Substitute When Modifying a Rule of Common Law.

The petitioners argue that the Due Process Clause of the Fourteenth Amendment requires a *quid pro quo* or

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[25] *Missouri Pacific*, 115 U.S. at 524.

[26] *Duke Power*, 438 U.S. at 93; *New York Central R.R. Co.*, 243 U.S. at 201.

reasonably just substitute in order for the Missouri General Assembly to "displace" or "abolish" a common law right. However, neither case cited by petitioners, *Duke Power* nor *New York Central,* holds that a *quid pro quo* or reasonably just substitute is required. Rather, in *Duke Power* this Court stated:

> [I]t is *not at all clear* that the due process clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy.

Duke Power, 438 U.S. at 88 (emphasis added); *see also New York Central,* 243 U.S. at 201.

And both *Duke Power* and *New York Central* are distinguishable from the instant case. *Duke Power* involved a congressional enactment which abolished the right to sue nuclear power plant operators at common law; *New York Central* involved the complete abrogation of an injured worker's right to sue his employer for a job-related injury.

It should be noted that §§ 538.205-538.235 do not "abolish" any common law cause of action. Nor do they, as in *Duke Power* and *New York Central,* "set aside one body of rules only to establish another system in its place."[27] Chapter 538 only *modifies* the common law. And as previously noted, no person has a vested property interest in any rule of the common law. The Missouri General Assembly was thus within its power to limit the

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[27] *New York Central,* 243 U.S. at 201.

dollar amount of noneconomic compensatory damages without a *quid pro quo*.

In fact, it is arguable a state legislature could completely abolish a common law right without a *quid pro quo*.[28] In *Silver v. Silver*, 280 U.S. 121, 122 (1929), this Court upheld a newly enacted Connecticut "guest" statute which *abolished* an individual's right to proceed against the driver of an automobile. Likewise, in *Mobile, J & K R Co. v. Turnipseed*, 219 U.S. 39, 40 (1910), Mississippi's abrogation of the common law "fellow servant" doctrine, as applied to employees of railroad corporations, was upheld. Neither statute established a *quid pro quo* and yet both were upheld.

C. Section 538.210 Is Not Arbitrary or Capricious.

Petitioners further argue that § 538.210 violates substantive due process because it is arbitrary, capricious and irrational. The petitioners in *Duke Power* likewise argued that the cap imposed by the Price-Anderson Act was arbitrary and capricious. In rejecting this same argument there, this Court noted:

> [C]andor requires acknowledgment that whatever ceiling figure is selected will, of necessity, be arbitrary in the sense that any choice of a figure based on imponderables like those at issue here can always be so characterized. This

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[28] Other courts have held that a *quid pro quo* is not required to abolish a common law right. *See Pendergast v. Nelson*, 256 N.W.2d 657, 671 (Neb. 1977) ("There is no merit to the argument that if a common law right is to be taken away something must be given in return.").

> is not, however, the kind of arbitrariness which flaws otherwise constitutional action.

Duke Power, 438 U.S. at 86.

The dollar amount selected in § 538.210.1, like the cap chosen by Congress in the Price-Anderson Act, may therefore be characterized as "arbitrary" in the sense that it selects *any* ceiling figure for damages. But under this Court's holding in *Duke Power*, that does not make the statute unconstitutional.

Moreover, the cap does not, as petitioners allege, defy rational explanation. It was enacted by the General Assembly in an attempt to combat what it felt was a developing medical malpractice crisis within the state.[29] The legislature is, and should be, the primary judge of the necessity for an enactment such as this. *See West Coast Hotel v. Parish*, 300 U.S. 379, 398 (1936); *see also Watson v. Buck*, 313 U.S. 387, 403 (1940) (deference given to state legislature).

Finally, the notion that due process authorizes courts to strike down laws they believe were enacted unwisely has long ago been discarded by this Court:

> [The] doctrine . . . that due process authorizes Courts to hold laws unconstitutional when they believe the legislature has acted unwisely . . . has long been discarded. . . . Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit

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[29] *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898, 904 (Mo. 1992).

> to "subject these states to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the 14th Amendment was intended to secure."

Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (*quoting Sproles v. Binford*, 286 U.S. 374, 388 (1932)).

IV. SECTION 538.210.1 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. A Statute That Applies a Cap to Noneconomic Damages Applicable Only in Medical Malpractice Lawsuits Does Not Impact a Suspect Class or Impair a Fundamental Right.

The first step in addressing any equal protection analysis is to determine whether the challenged classification operates to the disadvantage of a suspect class or impinges upon a fundamental right protected by the Constitution, thereby requiring strict judicial scrutiny. If the classification does not burden a suspect class or impinge upon a fundamental right, the statute will withstand constitutional challenge so long as the classification bears a rational relationship to a legitimate state purpose. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172-173 (1972).

This Court has identified "suspect" classifications as those based on alienage, ancestry and race. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976). On defining a "suspect" class, this Court said:

> A suspect class is "one saddled with such disabilities, or subject to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

Id. at 313 (*quoting San Antonio School District v. Rodriquez*, 411 U.S. 1, 28 (1973)). Clearly, plaintiffs in medical negligence lawsuits do not fit this description.

"Fundamental" rights include the right to vote, to travel interstate, to personal privacy and to free speech, as well as other First Amendment protections. *Massachusetts Board*, 427 U.S. at 312 nn. 3-4.

The constitutional guarantee of equal protection is intended to protect against "invidious discrimination." When neither a fundamental right is infringed nor a suspect class impacted, the equal protection safeguard is only offended when a classification "rests on grounds wholly irrelevant to the achievement of the state's objective." *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). Indeed, the state is not required to prove the correctness nor, ultimately, the wisdom of a legislative decision. The state legislature is presumed to have acted within constitutional confines even if, "in practice, their laws result in some inequality." *McGowan*, 366 U.S. at 425.

The issue which this Court would have to decide – if it were to grant *certiorari* in this case – is not whether a cap that distinguishes between medical malpractice torts and other torts will *in fact* ensure the availability of affordable health care in Missouri, but whether in 1986 there was reason for the legislature to believe it would. Equal protection is satisfied if the Missouri General

Assembly could have reasonably anticipated that the cap provision would reduce costs and promote the availability of health care services.[30] The reasonableness of the legislature's purpose in enacting §§ 538.205-538.235 remains at least debatable. Therefore, the equal protection issue must be resolved in the legislature's favor. *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938).

B. The Cap Is Rationally Related to a Legitimate Governmental Objective.

Several jurisdictions have upheld the constitutionality of medical malpractice legislation in the face of equal protection attacks. *Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985) (noneconomic medical malpractice cap was rationally related to the objective of reducing the cost to malpractice defendants and their insurers, and therefore did not violate due process or equal protection); *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986) (noneconomic cap was rationally related to the perceived crisis in the malpractice industry and therefore did not violate due process or equal protection); *Davis v. Omitowoju*, 883 F.2d 1155 (3rd Cir. 1989) (statutory noneconomic cap was rationally related to a legislative desire to curb high cost of malpractice insurance and thereby

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[30] In an *amicus curiae* brief filed in the Missouri Supreme Court when petitioners' appeal was being considered there, the Missouri Medical Association cited rather compelling data regarding the *actual* effect the 1986 enactment had had on professional liability insurance premiums in Missouri, which strongly suggested that the "reform" legislation was in fact having the desired effect of decreasing professional liability insurance premiums for health care providers. *See* Appendix B.

promote quality medical care, therefore due process and equal protection were not violated); and *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989) (statutory cap on total medical malpractice recovery was reasonably related to a valid legislative purpose of maintenance of adequate health care services and therefore did not violate due process or equal protection guarantees).[31]

This Court has found that a statutory limitation on tort recoveries is "a classic example of an economic regulation – a legislative effort to structure and accommodate 'the burdens and benefits of economic life'." *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 83 (1978).

As this Court has noted:

> States are not required to convince the courts of the correctness of their legislative judgments. Rather, those challenging the legislative judgment must convince the court the legislative facts upon which the classification is apparently based *could not reasonably be conceived to be true by the governmental decisionmakers.*

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1979) (emphasis added).

In order to justify this Court's issuance of a writ pursuant to 28 U.S.C. § 1257(a), petitioners must demonstrate that the Missouri General Assembly acted in an arbitrary and irrational way in enacting the statute in

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[31] *See also Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525 (Va. 1989) (total cap on medical malpractice recovery did not violate procedural due process, substantive due process, equal protection or the right to trial by jury).

question. But Missouri's cap is rationally related to the legislature's goal of promoting the availability and affordability of health care services by limiting the high cost of malpractice insurance – and thus, ultimately, the cost of health care to Missouri's citizens as well.

Petitioners cite cases[32] that found no reasonable relationship existed between a statutory cap on damages on the one hand, and the state's interest in reducing malpractice insurance costs and increasing the availability of health care on the other, in an effort to persuade this Court to review Missouri's statute. However, the petitioners' cases have either been subsequently overruled, involve statutes that are too dissimilar to be of use in addressing the constitutionality of Missouri's statute or were decided based upon a provision of a state, not the federal, constitution.[33]

C. Heightened Scrutiny Is Inapplicable, Nevertheless the Cap Provision Survives Its Application.

Petitioners urge this Court to apply "heightened scrutiny" in its analysis of their equal protection claim,

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[32] *See Waggoner v. Gibson*, 647 F. Supp. 1102, 1106 (N.D. Tex. 1988); *Baptist Hospital of Southwest Texas, Inc. v. Baber*, 672 S.W.2d 296, 298 (Tex. App. 1984); *Wright v. Central DuPage Hospital Association*, 347 N.E.2d 736, 741-42 (Ill. 1976).

[33] *Waggoner* was subsequently overruled by the Fifth Circuit in *Lucas v. United States*, 807 F.2d 414, 422 (5th Cir. 1986), thus deflating that decision and the Texas state court decision, *Baptist Hospital*, which invalidated the Texas cap on federal equal protection grounds. *Wright* concerned a *total* cap. 347 N.E.2d at 741. In addition, the *Wright* decision was based on a provision of the Illinois Constitution, not on federal equal protection analysis. *Id.* at 743.

even though this Court has repeatedly held that the "rational basis" test governs equal protection analysis if neither a fundamental right nor a suspect classification is involved. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 173 (1972).

This Court's guidance in determining "quasi-fundamental rights" or "semi-suspect" classes shows that the right to recover for personal injuries is not a right so significant as to warrant heightened scrutiny. This Court has only applied heightened scrutiny in cases of illegitimacy,[34] gender,[35] and alienage.[36] In *Duke Power Co.*, this Court used the "rational basis" test to uphold a federal law capping damages in the event of a nuclear accident. 438 U.S. at 93. Respondent respectfully suggests that application of "heightened scrutiny" to the statute in question would not be warranted.

However, even if this Court were to decide to establish a third category of equal protection analysis, Missouri's cap clearly bears a reasonable and substantial relationship to the legislative objective of controlling costs and maintaining the integrity of Missouri's health care system. Therefore it passes "heightened scrutiny" review.

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[34] *Clark v. Jeter*, 486 U.S. 456 (1988).

[35] *Craig v. Boren*, 429 U.S. 190 (1976).

[36] *Plyler v. Doe*, 457 U.S. 202 (1982).

D. There Is No Split of Authority Among the Federal Courts Regarding the Validity of Statutory Caps on Noneconomic Damages in Medical Malpractice Cases.

Petitioners claim there is a "clear and substantial" split of authority among the federal and state courts as to the constitutionality of statutory caps[37] based on federal equal protection grounds. This is simply not the case. Petitioners could not find even one federal case to support their claim.

All of the federal courts which have considered the constitutionality of reform acts have upheld such acts as constitutional.[38] Similarly, numerous state courts have ruled that these caps are valid under federal equal protection analysis.[39] Petitioners, nevertheless, cite several state court cases invalidating statutory caps on equal protection grounds as "proof" that there is a "clear and substantial split of authority." However, these cases and statutes are either distinguishable from the present case, have

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[37] Petition for Writ, page 5.

[38] *See Boyd v. Bulala*, 877 F.2d 1191, 1197 (4th Cir. 1989); *Davis v. Omitowoju*, 833 F.2d 1155, 1158-59 (3rd Cir. 1989); *Lucas v. United States*, 807 F.2d 414, 422 (5th Cir. 1986); and *Hoffman v. United States*, 767 F.2d 1431, 1437 (9th Cir. 1985).

[39] *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525, 533-34 (Va. 1989); *Fein v. Permanente Medical Group*, 695 P.2d 665, 682-83 (Cal. 1985), *appeal dismissed*, 474 U.S. 892 (1985); *Sibley v. Board of Supervisors of Louisiana State University*, 462 So.2d 149, 158 (La. 1985), *opinion modified*, 477 So.2d 1094, 1109-10 (La. 1985); *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E.2d 585, 598-600 (Ind. 1980); *Pendergast v. Nelson*, 256 N.W.2d 657, 668 (Neb. 1977).

been erroneously interpreted by petitioners or have been subsequently overruled.[40]

There is *not* a split among the federal courts regarding the constitutionality of a statute that applies a cap on noneconomic damages applicable only to medical malpractice cases. Petitioners attempt to manufacture a split

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[40] Petitioners' supporting case law is inapplicable and too dissimilar to be of use in addressing the constitutionality of Missouri's cap. Many of the cases petitioners cite address total caps. *See Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *McGuire v. C&L Restaurant, Inc.*, 346 N.W.2d 605, 609, 613 n.10 (Minn. 1984).

Petitioners cite *Jones v. State Board of Medicine*, 55[illegible] P.2d 399 (Idaho 1976), *cert. denied*, 431 U.S. 914 (1977). This is erroneous. The Idaho Supreme Court **upheld** the statutory caps against constitutional attack.

Petitioners also claim *Pfost v. Montana*, 713 P.2d 495 (Mont. 1985) supports the use of strict scrutiny because the right to full legal redress is fundamental. *Pfost* also dealt with a total cap. Furthermore, *Pfost* was **overruled** by the Montana Supreme Court in 1989 and is no longer good law or valid precedent. *Romero v. J&J Tire, JMH, Inc.*, 777 P.2d 292, 294 (Mont. 1989) (*citing Meech v. Hilhaven West, Inc.*, 776 P.2d 488, 491 (Mont. 1989)).

In *Meech*, the plaintiff claimed to be denied his *fundamental* right to full legal redress on equal protection grounds. The defendant answered that the Montana Constitution guaranteed only a right of access to courts "to seek a remedy for wrongs *recognized by common law or statutory authority, and the legislature may alter common law causes of action to promote a legitimate state interest.*" *Id.* at 491 (emphasis added). The Montana Supreme Court expressly adopted the defendant's interpretation and overruled *Pfost* insofar as it held that the Montana Constitution guaranteed "a fundamental right to full legal redress." Consequently the *Pfost* court's application of strict scrutiny is no longer valid since *Meech* holds that there is no fundamental right to full legal redress. Montana therefore supports respondent's position, not petitioners'.

by citing state court cases invalidating caps. However, petitioners' supporting case law is inapplicable to Missouri's cap. Those cases have either been overruled, involve statutes too dissimilar to be of use in addressing the constitutionality of Missouri's statute or were based on some provision of another state's constitution. Petitioners have completely failed to demonstrate any genuine split of authority on this issue.

CONCLUSION

Because the provisions of § 538.210.1 are not repugnant to either the Due Process or Equal Protection clauses of the Fourteenth Amendment, this Court's jurisdiction is not properly invoked pursuant to 28 U.S.C. § 1257(a). And because no substantial federal question is presented by the petition for writ of *certiorari*, it should be denied.

Respectfully submitted,

FLOYD R. FINCH, JR.*
TIMOTHY M. AYLWARD
SALLY L. THIEMAN
BLACKWELL, SANDERS, MATHENY, WEARY & LOMBARDI
Two Pershing Square, Suite 1100
2300 Main Street
P.O. Box 419777
Kansas City, Missouri 64141-6777
(816) 274-6800
FAX: (816) 274-6915

Attorneys for Respondent
The Children's Mercy Hospital

*Counsel of Record

APPENDIX A

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

NICOLE ADAMS, A Minor Child, By and Through Her Legal Guardian and Next Friend, JULIA ALICE ADAMS, and JULIA ALICE ADAMS, Individually,	CASE NO.: CV89-23626
Plaintiffs,	DIVISION: 6
v.	
THE CHILDREN'S MERCY HOSPITAL, et al,	CIVIL DOCKET: "M"
Defendants.	

PLAINTIFFS' MOTION TO BAR THE ENFORCEMENT OF ANY AND ALL PROVISIONS OF V.A.M.S., CHAPTER 538 (TORT ACTIONS BASED ON IMPROPER HEALTH CARE) AS UNCONSTITUTIONAL UNDER THE UNITED STATES AND MISSOURI CONSTITUTIONS

COME NOW Plaintiffs, by and through their counsel of record, and move this Court for its Order barring the enforcement of Chapter 538 V.A.M.S. (Tort Actions Based on Improper Health Care) for the reasons set forth herein and in the attached Suggestions in Support expressly incorporated herein by reference:

1. This medical malpractice action is potentially affected by the Medical Malpractice Act passed by the Missouri legislature intending to apply to all causes of

action accruing on or after February 3, 1986 (Chapter 538, V.A.M.S., attached hereto as *"Exhibit A"*).

2.Chapter 538 is unconstitutional under the Missouri and United States Constitutions as denying Plaintiffs herein equal protection under the laws, due process of law, fair and open access to the courts, certain remedy afforded for every injury to person, right of trial by jury, and the constitutional right to one's health and happiness, all as set forth in the attached Suggestions in Support expressly incorporated herein by reference.

3. Using precisely the same analysis as exercised by the Missouri Supreme Court in striking down as unconstitutional the last two (2) attempts by the Missouri legislature to impair the rights of medical malpractice victims, this current medical malpractice legislation should be rendered null and void forthwith as unconstitutionally violative of Plaintiffs' guaranteed rights herein.

WHEREFORE, for the above-stated reasons, Plaintiffs Nicole and Julia Alice Adams respectfully request that this Court enter its Order in this matter as follows:

(a) That Chapter 538, Missouri Revised Statutes (Tort Actions Based on Improper Health Care) is directly violative of the Missouri and Federal Constitutional provisions set forth herein and shall be rendered null and void and of no effect in the trial of this action or beyond; and

(b) For such other and further relief as this Court deems just and proper.

Respectfully submitted,

ROBB & ROBB

/s/ Anita Porte Robb
GARY C. ROBB #29618
ANITA PORTE ROBB #30318
Mark Twain Tower, Suite 1500
106 West 11th Street
Kansas City, Missouri 64105
Telephone: (816) 474-8080
Facsimile: (816) 474-8081

ATTORNEYS FOR
PLAINTIFFS JULIA ALICE
ADAMS AND NICOLE
ADAMS

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing was mailed, postage-paid, on this 4th day of February, 1991, to:

Timothy M. Aylward, Esq.
BLACKWELL, SANDERS, MATHENY,
WEARY AND LOMBARDI
Two Pershing Square, Suite 1100
2300 Main Street
P.O. Box 41977
Kansas City, Missouri 64141-6777

ATTORNEYS FOR DEFENDANTS
THE CHILDREN'S MERCY HOSPITAL
SUSAN ROUSHAR, R.N. AND
CINDY DOOLEY, R.N.

Reid F. Holbrook, Esq.
Janet Simpson, Esq.
HOLBROOK & HEAVEN, P.A.
757 Armstrong
P.O. Box 171927
Kansas City, Kansas 66117

ATTORNEYS FOR DEFENDANT
JANE JELINEK, M.D.

/s/ Anita Porte Robb
ATTORNEY FOR PLAINTIFFS

[Petitioners' Exhibit A Omitted in Printing]

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

NICOLE ADAMS, A Minor Child, By and Through Her Legal Guardian and Next Friend, JULIA ALICE ADAMS, and JULIA ALICE ADAMS, Individually,	**CASE NO.: CV89-23626**
Plaintiffs,	**DIVISION: 6**
v.	
THE CHILDREN'S MERCY HOSPITAL, et al,	**CIVIL DOCKET: "M"**
Defendants.	

SUGGESTIONS IN SUPPORT OF PLAINTIFFS' MOTION TO BAR THE ENFORCEMENT OF ANY AND ALL PROVISIONS OF V.A.M.S, CHAPTER 538 (TORT ACTIONS BASED ON IMPROPER HEALTH CARE) AS UNCONSTITUTIONAL UNDER THE UNITED STATES AND MISSOURI CONSTITUTIONS

COME NOW Plaintiffs, by and through their counsel of record, and for their Suggestions in Support of their Motion to Bar the Enforcement of Chapter 538, V.A.M.S. (Tort Actions Based on Improper Health Care) state and allege as follows:

I. FACTUAL BACKGROUND AND PROCEDURAL CONTEXT OF MOTION

This medical malpractice cause of action comes to trial before this Court on February 11, 1991. In that this

cause of action arose on March 30, 1988, it is arguably and potentially affected by a medical malpractice statute passed by the Missouri legislature which, on its face, is intended to apply to all such causes of action accruing on or after February 3, 1986.

Plaintiffs hereby admit and stipulate that their tort action is based on improper health care, but dispute the applicability of Chapter 538 and each of its provisions set forth therein as violating their United States and Missouri constitutional rights to due process of law, open courts, right of trial by jury, and equal rights and opportunities under the law. For the reasons set forth herein, Plaintiffs respectfully request that this Court firmly and unequivocally strike down chapter 538 and render it null and void in any application to the instant case in view of its clear violation of the various constitutional guarantees set forth and applicable herein.

II. AUTHORITY AND ANALYSIS

A number of other states have stricken down similar medical malpractice legislation as violative of their own state constitutional guarantees. ***Montana – Pfost v. Montana,* 713 P.2d 945 (Mont. 1985); *Ohio – Duran v. Suburban Community Hospital,* 482 N.E.2d 1358 (Ohio C.P. 1985); *Washington – Sofie v. Fiberboard Corp.,* 771 P.2d 711 (Wash. 1989); *Texas – Lucas v. United States,* 757 S.W.2d 687 (Tex. 1988); *Virginia – Boyd v. Bulala,* 647 F.Supp. 781 (W.D.Va. 1986); *Florida – Smith v. Department of Insurance,* 507 So.2d 1080 (Fla. 1987).** Our sister state of Kansas struck down in its entirety the Kansas medical malpractice act as unconstitutional in ***Kansas***

Malpractice Victim's Coalition v. Bell, 757 P.2d 251 (Kan. 1988). All of these states have similar constitutional provisions to that found in the Missouri Constitution of 1945, Bill of Rights.

A. This Court Has the Power, Authority, and Duty to Strike Down Chapter 538 as Unconstitutional

It is the duty and responsibility of this Court to strike down and to block the application of any legislative act or statute which is in conflict with the provisions of the Federal or United States Constitution. In 1822, the Supreme Court of Missouri held in *Baily v. Gentry*, 1 Mo. 164, that it was the duty of the court to inquire into the constitutionality of an act of the legislature.

If a statute conflicts with a constitutional provision, that statute "stands for naught" and is void as fully as if it had been specifically repealed. *Pogue v. Swink*, 261 S.W.2d 40 (Mo. 1953); *State ex rel. Goldman v. Hiller*, 278 S.W. 708 (Mo. 1926). Indeed, the Missouri Supreme Court has placed that duty upon all of the courts of the state of Missouri to first and foremost enforce the Constitution and the court held that the courts of the state should "brush aside any statute which conflicts with (the Constitution), whether it was passed before or after the Constitution was adopted." *Kansas City, Fort S & M.R. Co. v. Thornton*, 54 S.W. 445 (Mo. 1899).

The Missouri legislature's last attempt to establish a Chapter 538 affording special rights and privileges to health care providers was stricken down by the Supreme Court of Missouri, en banc, in *State ex rel. Cardinal Glennon Memorial Hospital for Children v. Gaertner*, 583

S.W.2d 107, 110-11 (Mo.banc 1979). The Court held that the Chapter 538 requirement that malpractice plaintiffs must refer their claim to a professional liability review board before filing their action in court was unconstitutional as depriving plaintiffs a fair right of access to the courts. The Court found that it violated the "open courts" provision of the Missouri Constitution of 1945. *Id.* at 110.

It is most noteworthy for present purposes that it was the ***trial court*** which initially struck Chapter 538 as unconstitutional in ***State ex rel. Cardinal Glennon Memorial Hospital for Children v. Gaertner, supra.*** The Honorable Carl R. Gaertner, Judge, Circuit Court of the City of St. Louis, held that Chapter 538 was unconstitutional and overruled the defendant's motion to dismiss on the basis of the plaintiff's failure to comply with the review board requirement.

Under the circumstances of the present action, it remains the duty of the trial court in the first instance to zealously guard the constitutional rights of Missouri citizens.

B. Plaintiffs Assert Standing to Challenge Constitutionality of Chapter 538 In View of the Substantial, Impending and Immediate Invasion of Their Personal Constitutional Rights Which Would Have the Effect of Injuring Them

Plaintiffs herein assert standing to challenge Chapter 538 as unconstitutional in view of the impending injury by its application to them during the trial of their medical negligence case beginning February 11, 1991. Plaintiffs have only one (1) opportunity as a matter of law to

present their case to a jury. As set forth herein, the application of the provisions of Chapter 538 at trial and afterwards would cause severe and irreparable harm to Plaintiffs herein. That harm is real, impending, and substantive, and not illusory, permitting Plaintiffs herein standing to assert that the legislative act at issue is unconstitutional and should be stricken. *Stouffer v. Crawford*, 248 S.W. 581 (Mo. 1923); *State ex rel. Atlantic Horse Insurance Co. v. Blake*, 144 S.W. 1094 (Mo. 1912), *ovrld. on other grnds; Missouri Pacific R. Co. v. Kirkpatrick*, 652 S.W.2d 128 (Mo. 1983).

C. Chapter 538, In Its Entirety, Should Be Stricken, or In the Alternative, the Specific Provisions Set Forth Below Should Be Stricken as Violative of the United States and Missouri Constitutions

The medical malpractice statute, Chapter 538, has several provisions which substantially increase the burden of a medical malpractice plaintiff, interfere with their ability to obtain and collect a judgment, and limit the amount of damages obtainable, all of which conflict directly with provisions of the United States and Missouri Constitutions.

1. Chapter 538 Purports to Permit a Medical Malpractice Defendant to Apportion Fault to Non-Parties Pursuant to Section 538.230 – This particular provision of the statute presumably would permit a defendant to apportion fault to persons who are not at the time of trial parties to the litigation. V.A.M.S. 538.230.1. Any other tort

victim, other than those injured by health care providers, need not concern him or herself with defending the actions of persons who are not parties at trial. This arbitrary and capricious provision is directly in conflict with Sections 2, 10, 14, and 22(a) of the Missouri Constitution and Bill of Rights of the United States Constitution guaranteeing right to trial by jury, equal protection and due process.

2. **Modification of Joint and Several Liability** – Section 538.230.2 would permit a medical malpractice defendant to escape the rules of joint and several liability applicable in favor of all injured persons, other than those hurt by doctors or hospitals. This section indicates that a malpractice defendant would only be jointly liable with defendants whose apportioned percentage of fault is equal to or less than such defendant. *See* A. Robb, *Missouri's Medical Malpractice Legislation: Handbook, Forms and Jury Instructions* (UMKC/CLE 1986 and 1990 Supp.), p. 21-22.

That being the case, a malpractice plaintiff is faced with the real threat of suffering a substantial, uncollected portion of a verdict due to the application of this provision which is directly in violation of Sections 2, 10, 14, and 22(a) of the Missouri Constitution and Bill of Rights of the United States constitution guaranteeing right to trial by jury, equal protection and due process.

3. **Itemization of Damages** – Section 538.215 would require that in a lawsuit against a doctor or hospital that the jury must itemize damages as between five (5) distinct categories. Again, any other tort victim need not

have the categories of damages itemized and that provision creates additional burdens of persuasion and proof not to be hazarded by other tort victims. The application of this provision is directly in violation of Sections 2, 10, 14, and 22(a) of the Missouri Constitution and Bill of Rights of the United States Constitution guaranteeing right to trial by jury, equal protection and due process.

4. **Requirement That Future Damages May Be Payable in Periodic or Installment Payments** – Section 538.220 would require that any future damages be paid in whole or in part in periodic or installment payments should the sum exceed One Hundred Thousand Dollars ($100,000.00). Such provision is onerous and unfair to a malpractice victim and is not to be found applicable to a person injured in any other way. The application of this provision is directly in violation of Sections 2, 10, 14, and 22(a) of the Missouri Constitution and Bill of Rights of the United States Constitution guaranteeing right to trial by jury, equal protection and due process.

5. **Limitation on "Non-Economic Damages"** – Section 538.210 purports to limit non-economic damages to a particular dollar figure as set forth each January 1st. That particular dollar figure purportedly applicable at the present time is $430,000.00 per separately insured defendant.

This most noxious and unconstitutional provision harms those the most who are in most need of the award and who are hurt the worst. This provision of Chapter 538 cannot withstand judicial scrutiny, and should be stricken forthwith. Plaintiffs herein should not be

unfairly deterred or threatened by the potential applicability of this damage limitation provision. The application of this provision is directly in violation of Sections 2, 10, 14, and 22(a) of the Missouri Constitution and Bill or [sic] Rights of the United States constitution guaranteeing right to trial by jury, equal protection and due process.

6. **Chapter 538 In Its Entirety** – The above provisions and the remaining provisions of Chapter 538, in its entirety, work to undermine the rights of medical negligence plaintiffs as contrasted directly to those rights of other injured persons. Chapter 538 as a whole is unconstitutional and directly violative of the particular constitutional provisions as set forth herein. It should be stricken in its entirety and rendered null and void as applicable to the cause of action herein.

D. Chapter 538 and the Specific Provisions Therein, Are Directly Violative of the Missouri Constitution, Article 1, Bill of Rights, Sections 2, 10, 14, and 22(a)

1. **Plaintiffs' Constitutional Rights To Equal Opportunities Under the Law are Violated by Chapter 538 and its Provisions Therein** – Section 2 of Article 1 of the Missouri Constitution, which is the Bill of Rights, provides as follows:

> "That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; *that all persons are created equal and are entitled to equal rights and opportunities under the law;* that to give

> security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design."

(Missouri Constitution of 1945, Article 1, Section 1) (Emphasis added). The specific provisions of Chapter 538 set forth above and incorporated in this section by specific reference thereto violate Plaintiffs' constitutional rights.

Chapter 538 creates a "suspect class" of persons injured by the acts of health care providers and imposes upon them burdens and conditions affecting their fundamental rights which are not imposed upon other members of the larger class of injured persons in general. In that a "suspect class" exists, strict judicial scrutiny of the offending statute is required by the Missouri Constitution. ***State Board of Registration for the Healing Arts v. Giffen*, 651 S.W.2d 475, 479 (Mo. 1983); *State v. Bolder*, 635 S.W.2d 673, 682 (Mo.banc. 1982), *cert. denied*, 459 U.S. 1137 (1983).**

Persons injured by a drunk driver, a toppling building, or in an airplane crash have the rights and privileges of the common law unfettered by Chapter 538 and similar provisions therein. For example, in a motor vehicle accident, a defendant may not point to the actions of a released party and claim that certain fault should be attributable to that released party with the effect of reducing his or her own apportionment of fault. Merely permitting the evidence of allegedly negligent acts of non-parties creates an unnecessary burden and impediment to the malpractice victim's case.

Chapter 538 and its provisions should be stricken down as directly violative and in conflict with Section 2 of Article 1, Bill of Rights of the Missouri Constitution.

2. **Chapter 538 and its Individual Provisions Violate Due Process of Law** – Section 10 of the Missouri Constitution, Article 1, Bill of Rights, provides that:

> "That no person shall be deprived of life, liberty or property *without due process of law.*"

(Missouri Constitution of 1945, Article 1, Bill of Rights, Section 10) (Emphasis added). By enacting Chapter 538 and seeking to apply it to persons injured by the actions of health care providers, the legislature is denying to Plaintiffs herein and other similarly injured persons the due process of law guaranteed by the Constitution.

Due process of law is not some amorphous concept devoid of substance or meaning. The Missouri Supreme Court has expressly stated that the term "due process of law" is synonymous with the "law of the land." ***State v. Jones*, 268 S.W. 83 (Mo. 1925); *Wilcox v. Phillips*, 169 S.W. 55 (Mo. 1914).** In particular, "due process of law" means that the individual safeguards applicable for the protection of the individual rights for one class of persons will govern precisely those rights and duties for persons which belong to that same class. ***Ivie v. Bailey*, 5 S.W.2d 50 (Mo. 1928).** Due process requires that the law applies equally to *all* within a particular class and failing that, there is a violation of a citizen's fundamental constitutional rights. ***State ex rel. Sweezer v. Green*, 232 S.W.2d 897 (Mo. 1950), *ovrld. on other grnds; State ex rel. North v. Kirtley*, 327 S.W.2d 166 (Mo. 1959).**

The specific provisions of Chapter 538 set forth above, and the legislation in its entirety, deprive Plaintiffs herein of the due process of law. As such, Chapter 538 should be stricken down and held null and void.

3. Chapter 538 and its Specific Provisions Therein, Violate the "Open Courts" Provision of the Missouri Constitution – Section 14 of the Missouri Constitution, Article 1, Bill of Rights, provides that:

> "That the *Courts of Justice shall be open to every person,* and *certain remedy afforded for every injury to person,* property or character, and that right and justice shall be administered without sale, denial, or delay."

(Missouri Constitution of 1945, Article 1, Section 14, Bill of Rights) (Emphasis added). To the extent that Chapter 538 and its specific provisions set forth herein hinders Plaintiffs in their proof, obtaining a verdict and judgment, and beyond, it closes the courts to them in a very real sense.

Indeed, it was upon this provision that the Missouri Supreme Court relied in holding the original Chapter 538, requiring a Professional Liability Review Board, void as unconstitutional. ***State ex rel. Cardinal Glennon Memorial Hospital for Children v. Gaertner,* 538 S.W.2d 107, 110-11 (Mo.banc 1979).** If the process of requiring a pretrial procedure is held to interfere with a Missouri citizen's access to the courts, then certainly an arbitrary and burdensome trial process itself would be even more constitutionally offensive.

The remedy to be provided to Plaintiffs herein may be substantially affected by the arbitrary and unwarranted provision limiting recovery on non-economic damages. Simply requiring the categorization of damages in order to establish which damages are "non-economic" in nature burdens Plaintiffs in setting forth their proof on damages. In view of the unconstitutionality of the "damages caps" provision, this court should not require categorization of the damages as set forth by Chapter 538.215 and should similarly hold null and for naught the remaining provisions of Chapter 538 in its entirety.

The "open courts" provision of the Missouri Constitution was specifically intended to protect citizens in enforcing rights recognized by law. ***Horner v. David Distributing Company,*** **599 S.W.2d 100, 102 (Mo.App. 1980).** Missouri common law sets forth the rights of recovery, joint and several liability, and the rules affecting the obtaining of judgments and damages as applicable to all tort victims. Chapter 538 does not protect Plaintiffs herein in enforcing these rights as recognized by law and must fail.

In a recent decision balancing the rights of a medical malpractice claimant as against the State's interest in remedying a "perceived medical malpractice crisis," the Supreme Court of Missouri came down firmly on the side of the medical malpractice plaintiff. In ***Strahler v. St. Luke's Hospital,*** **706 S.W.2d 7 (Mo.banc 1986),** the Court struck down as unconstitutional the legislative attempt to bar a medical malpractice claimant's claim for failure to file within the statutory two-year period of limitation. ***Id.*** **at 8-9.**

The Court began its constitutional analysis by emphasizing that the Missouri and Federal Constitutions are not synonymous. According to the Court:

> " . . . our State constitution is also a reservoir of personal rights and liberties – some of which are not enumerated in or accorded protection by our Federal Constitution. Article I, Section 14 is one such provision in our State Constitution which grants to the people of Missouri an express constitutional guarantee not enumerated in our Federal Constitution."

Id. at 9 (Emphasis added). The Court proceeded to review the decision of ***State ex rel. Cardinal Glennon Memorial Hospital for Children v. Gaertner, supra,*** concluding that that decision "was intended to give constitutional protection to a litigant's ability to gain access to Missouri's courts." *Id.*

In reviewing the constitutional history of the "open courts" provision, the Court concluded that:

> "The language contained in Mo.Const.Art. I, Sec. 14, is not simply advisory in nature: it gives express constitutional protection to a litigant's right of access to our court system."

Id. The Missouri Supreme Court then went about the task of weighing the legislature's purpose in enacting the statute as balanced against the effect on the malpractice claimant's constitutional rights. The Court pointed out that:

> "State legislatures reacted in the 1970's to a perceived crisis in medical malpractice insurance by enacting these types of limitations provisions. ***While some provisions no doubt go some***

> ***distance in alleviating the problem of malpractice insurance and health care providers, they do so only at a high cost.***"

Id. **at 10** (citing to 5 *Journal of Legal Medicine,* 469 [1984]) (Emphasis added). While the Court "fully appreciate[d]" the purpose of the legislature in enacting this statute, the Court expressly found that:

> " . . . the method employed by the legislature to battle any escalating economic and social costs connected with medical malpractice litigation exacts far too high a price . . . "

Id. **at 11.** In no uncertain terms, the Court held that the statute "runs afoul of our State Constitution and we accordingly hold it constitutionally infirm." ***Id.***

Precisely the same constitutional balancing and analysis is applicable to the legislation challenged in the case at bar. Although a few of the challenged provisions have in their pre-trial effect only a "chilling" propensity, such as the requirement to reduce future damages to present value, other provisions directly and immediately impact upon the trial of the case.

For example, permitting into evidence any testimony as to the fault of a non-party or released party would serve to undermine and diminish Plaintiffs' full and fair access to the courts and denies that "certain remedy afforded for every injury to person," which is Plaintiffs' constitutional guarantee under Article 1, Section 14. If the *Strahler* Court held that piece of legislation unconstitutional, the Supreme Court of Missouri surely would find the current version of Chapter 538 even more noxious and require swift and certain constitutional nullification.

4. Chapter 538 and its Specific Provisions is Violative of Plaintiffs' Constitutional Right of Trial by Jury. Section 22(a) of the Missouri Constitution provides that:

> *"That the right of trial by jury as heretofore enjoyed shall remain inviolate;* provided that a jury for the trial of criminal and civil cases in courts not of record may consist of less than twelve citizens as may be prescribed by law, and a two-thirds majority of such number concurring may render a verdict; and that in every criminal case any defendant may, with the assent of the court, waive a jury trial and submit the trial of such case to the court, whose finding shall have the force and effect of a verdict of a jury."

(Missouri Constitution of 1945, Bill of Rights, Article 1, Section 22[a]) (Emphasis added).

The medical malpractice legislation, Chapter 538, and its specific provisions, directly and substantively interfere with Plaintiffs' right of trial by jury. This right has been construed to mean the right to a jury trial as it was recognized at the time of the adoption of the Missouri State Constitution. ***Lee v. Conran*, 111 S.W.1151, 1153 (Mo. 1908).** That provision has existed virtually unchanged since the first Missouri Constitution was adopted in 1820.

Any civil action for a money judgment involving factual issues has always entitled plaintiff to a trial by jury. ***Jaycox v. Brune*, 434 S.W.2d 539, 542-43 (Mo. 1968).** The Plaintiffs' constitutional right to a trial by jury in this action is in immediate and impending danger of being violated by Chapter 538. The right to trial by jury means that the jury passes upon all disputed issues of fact.

To the extent that the Missouri legislature has sought to "pre-judge" the maximum extent of the Plaintiffs' money damages herein squarely and directly violates the right to trial by jury. Plaintiffs respectfully request that their full right to trial by jury be exercisable pursuant to Section 22(a) of the Missouri Constitution and that Chapter 538 in its entirety be stricken forthwith.

5. **Chapter 538 and its Specific Provisions Denies Plaintiffs Equal Protection and Due Process of Law Under the United States Constitution** – Due process of law under the United States Constitution means that a person has an opportunity to be heard at a meaningful time and in a meaningful manner. ***McGowan v. Maryland,* 366 U.S. 420, 426 (1961).** The Fourteenth Amendment to the United States constitution guarantees equal protection under the law and due process of law. The specific provisions set forth above violate the United States Constitution in every respect and in the same fashion as the Missouri Constitution. For these reasons, the provisions of the medical malpractice statute, and the statute in its entirety, must fail.

In ***Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803),** Chief Justice Marshall stated that:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. *One of the first duties of government is to afford that protection.*"

(Emphasis added).

III. CONCLUSION

The vast majority of medical malpractice statutes across the country which create different rights and burdens for victims of medical negligence and different privileges for malpractice defendants have been stricken down as unconstitutional. Indeed, our experience in Missouri with the prior medical malpractice statute having been stricken as unconstitutional is powerful precedent to the fate of this most recent legislation.

The applicability of the medical malpractice legislation affects the rights of Nicole and Julia Alice Adams to a jury trial, equal protection of the law, open courts, and a remedy by due process of law, all of which are guaranteed by the Bill of Rights of the Missouri Constitution of 1945. The Bill of Rights of the Missouri Constitution is there to protect every citizen, rich or poor, politically powerful or not. In striking down the provisions of the Kansas medical malpractice statute, the Kansas Supreme Court held that all of these rights were applicable to every citizen, even the "little guy on the block," and stated:

> *"They (provisions of the state's Bill of Rights) are there to protect the rights of a brain-damaged baby. a quadriplegic farmer or business executive, and a horribly disfigured housewife who is a victim of medical malpractice.* They are not there to see that the will of the majority is carried out, but to protect the rights of the minority. It is the obligation of this court in each case to carry out its constitutional responsibility."

***Kansas Malpractice Victim's Coalition v. Bell*, 757 P.2d 251 (Kan. 1988)** (Emphasis added).

Given the enormous time and expense of presenting a medical negligence action and putting on proof by both Plaintiff and Defendants, Plaintiffs Nicole and Julia Alice Adams respectfully request that this Court find that the provisions of Chapter 538 should be rendered null and void as unconstitutional under the Missouri and United States Constitutions and bar its application in every respect at the trial of this action.

WHEREFORE, for the above-stated reasons, Plaintiffs Nicole and Julia Alice Adams respectfully request that this Court enter its Order in this matter as follows:

(a) that Chapter 538, Missouri Revised Statutes (Tort Actions Based on Improper Health Care) is directly violative of the Missouri and Federal Constitutional provisions set forth herein and shall be rendered null and void and of no effect in the trial of this action or beyond; and

(b) For such other and further relief as this Court deems just and proper.

Respectfully submitted,

ROBB & ROBB

/s/ Anita Porte Robb
GARY C. ROBB #29618
ANITA PORTE ROBB #30318
Mark Twain Tower, Suite 1500
106 West 11th Street
Kansas City, Missouri 64105
Telephone: (816) 474-8080
Facsimile: (816) 474-8081

ATTORNEYS FOR PLAINTIFFS JULIA ALICE ADAMS AND NICOLE ADAMS

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing was mailed, postage-paid, on this 4th day of February, 1991, to:

Timothy M. Aylward, Esq.
BLACKWELL, SANDERS, MATHENY, WEARY AND LOMBARDI
Two Pershing Square, Suite 1100
2300 Main Street
P.O. Box 41977
Kansas City, Missouri 64141-6777

ATTORNEYS FOR DEFENDANTS
THE CHILDREN'S MERCY HOSPITAL
SUSAN ROUSHAR, R.N. AND
CINDY DOOLEY, R.N.

Reid F. Holbrook, Esq.
Janet Simpson, Esq.
HOLBROOK & HEAVEN, P.A.
757 Armstrong
P.O. Box 171927
Kansas City, Kansas 66117

ATTORNEYS FOR DEFENDANT
JANE JELINEK, M.D.

/s/ Anita Porte Robb
ATTORNEY FOR PLAINTIFFS

APPENDIX B

OUT-STATE MATURE CLAIMS MADE RATES
500,000/1,000,000 LIMITS

	GENERAL PRACTICE	GENERAL SURGERY	OB/ BYN [sic]
MDA	8,300	28,596	46,118
MoMED	11,389	33,416	47,345
RCA	8,924	31,263	50,149
ST. PAUL	20,360	40,071	76,962
AVERAGE	15,090	33,336	55,211

Above as of 12/1/88

MDA	6,415	16,534	38,309
MoMED	9,471	14,207	40,254
RCA	6,340	22,303	35,967
ST. PAUL	19,963	39,623	61,292
AVERAGE	10,547	23,167	43,956

Above as of 12/1/91

Compiled by Missouri Department of Insurance

MOMEDICO Rates 1983 - 1991
Mature Claims Made Rates 500,000/1,000,000 Limits

Year	Family Practice/ Normal Deliveries	General Surgery	OB/GYN
1983	$7,045	$11,669	$16,293
1984	8,806	14,586	20,366
1985	13,089	22,437	31,787
1986	18,327	34,034	44,506
1987	21,076	39,140	51,182
1988	22,975	42,668	55,796
1989	21,595	40,104	52,444
1990	19,183	32,883	46,585
1991	17,311	29,673	42,038

MOMEDICC New Claims Reported by Calendar Year

Year	Number of Claims
1983	224
1984	255
1985	262
1986	192
1987	194
1988	158
1989	160
1990	137